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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 821

UNITED ELECTRICAL CONTRACTORS ASSOCIATION, et al.,
Petitioner,

—v.—

ARNOLD ORDMAN, et al.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statement of the Case	2
Reasons for Granting the Writ	4
CONCLUSION	6
APPENDIX A—Opinion of the Court of Appeals	A-1

CASES CITED

Fay v. Douds, 172 F.2d 720	5
Leeds & Northrup Company v. N.L.R.B., 357 F.2d 527	5
Local 100 of the United Association of Journeymen and App. v. Borden, 373 U.S. 699	6
Marine Engineers Beneficial Association v. N.L.R.B., 202 F.2d 546, cert. denied 346 U.S. 819	5

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on September 23, 1966.

Opinions Below

The opinion of the Court of Appeals is not yet reported and is printed herein, Appendix A, page A-1. The opinion of the District Court for the Southern District of New York is reported at 51 CCH Lab. Cas. P. 19, 761 (p. 33, 949) (1965).

Jurisdiction

The judgment of the Court of Appeals was entered on September 23, 1966. The jurisdiction of this court is invoked under 28 U.S.C. Sec. 1254 (1).

Questions Presented

1. Does the District Court have the jurisdiction to review an abuse of power by the General Counsel of the National Labor Relations Board manifested by his refusal to issue a complaint?

2. Does the General Counsel have the absolute, unreviewable right to refuse to issue a complaint where there is a conceded *prima facie* unfair labor practice violation of the Labor Management Relations Act?

3. If Sec. 3 (d) of the Labor Management Relations Act, 1947 as amended (29 U.S.C. Sec. 153 (d)) gives the General Counsel the unrestricted and arbitrary mandate to issue or not to issue complaints, then is that provision of the statute an abridgment of the constitutional rights of the charging party?

Statement of the Case

At various times between March 28, 1963 and June 19, 1964, unfair labor practice charges were filed by plaintiffs electrical contractors with the Regional office for the Second Region of the National Labor Relations Board in New York City. The charges alleged violations by Locals 3 and 25 of the International Brotherhood of Electrical Workers in that:

(a) there was picketing at a secondary employer's place of business, and

(b) coercion, threats and attempts to compel the employer to cease doing business with co-plaintiff's

union, Industrial Workers of Allied Trade, Local 199, and sub-contractors, and to recognize and deal only with the picketing unions.

In each of the factual (10) situations, a *prima facie* showing of a violation of the Act was made by the charging party and notwithstanding no complaints were issued (except in one case where the complaint was issued and then withdrawn without the consent of the charging party). The Regional Director and General Counsel refused to give plaintiffs an opportunity to present their evidence, to be heard, and to refute any contradictory evidence elicited by the Board's investigator.

Plaintiffs' complaint before the Court seeks a judgment declaring the rights of the parties hereto and a mandatory injunction compelling the General Counsel and/or the National Labor Relations Board to issue complaints based on unfair labor practice charges filed by plaintiffs pursuant to the Labor Management Relations Act.

The District Court dismissed the complaint on the ground that the Court lacks jurisdiction over the subject matter.

The Court of Appeals affirmed the judgment of the District Court.

The District Court (Hon. John M. Cannella) based its decision on the following principles of law:

1. The refusal of the General Counsel to issue a complaint may not be reviewed.

2. The Federal Declaratory Judgment Act is not applicable because it is precluded by an applicable regulatory statute.

3. The Administrative Procedure Act is inapplicable, the judicial review of the General Counsel's refusal being precluded by the N.L.R.A.

Reasons for Granting the Writ:

1. That the United States Supreme Court has never before decided this important question of Federal law.

The Court of Appeals in its opinion stated:

> "* * * the district courts may not review the day-to-day exercise of the discretion given to the General Counsel in the issuance of Board unfair Labor practice complaints * * *."

This in effect gives the General Counsel the absolute, unreviewable right, no matter how arbitrary or contrary to the intent of the statute, to refuse to issue a complaint.

That this is contrary to the Congressional intent is evident from the remarks of Senator Taft.

In explaining the position which the General Counsel would occupy within the framework of the act (LMRA), he stated on the floor of the Senate just prior to its passage over the presidential veto (93 Cong. Rec. 7538):

> "All that we have done with the Board is to make a separation of powers. Under this bill the Board is judicial. It is judicial today: Its counsel will be a prosecutor. He will not have any extraordinary powers—*nothing like the power of the Attorney General of the United States* who decides whether criminal actions shall be brought against anyone in the United States. Under this bill, the Counsel will have the right to make the decisions as between employer and employees but *his decision will be subject to the decision of the Board and above the Board, the Courts; and we have given the Courts greater power to look into the decisions of the Board and to provide for the redress of any injustice.*" (Italics mine.)

2. That the United States Court of Appeals, Second Circuit, by its decision herein has decided an important question of law in direct conflict with the decisions of the Third Circuit, in *Marine Engineers Beneficial Association* v. *N.L.R.B.*, 202 F.2d 546, *cert. denied*, 346 U.S. 819; and *Leeds & Northrup Company* v. *N.L.R.B.*, 357 F.2d 527.

In one of the complaints in the case at bar (Surf Hunter Electric) a complaint was issued. Thereafter, the Regional Director dismissed the complaint over the objections of the charging party and without affording the charging party a hearing on his objections. These acts by the Board (in the Third Circuit cases) were held to be arbitrary and capricious and reviewable by the District Court.

3. That the decisions and opinions herein are in direct and abrupt conflict with the constitutional guarantees of procedural due process.

The question of General Counsel's power and authority to make arbitrary decisions without regard to the statutory intent and in violation of procedural due process is of great public concern and should be definitively answered by this Court. In the argument before the Court of Appeals counsel for respondent, in answer to a query from the Court, stated that the General Counsel had the unreviewable right to refuse to issue a complaint, where there was a violation of the statute, on the sole ground that the party being charged was a brother-in-law of the General Counsel.

Does this not constitute a violation of the rights guaranteed under the constitution?

Fay v. *Douds*, 172 F.2d 720.

The jurisdiction of the state courts has been pre-empted by the LMRA. Now we are being told that relief to which we are concededly entitled may be withheld arbitrarily, capriciously and by whim of the General Counsel.

Is the complaining party to be left with a wrong without a remedy? *Local 100 of the United Association of Journeymen and App.* v. *Borden,* 373 U.S. 699.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated: November 10, 1966.

Respectfully submitted,

LEON BRICKMAN,
Counsel for Petitioner.

APPENDIX A

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

—o—

No. 13—September Term, 1966.

(Argued September 22, 1966 Decided September 23, 1966.)

Docket No. 29879

—o—

UNITED ELECTRICAL CONTRACTORS ASSOCIATION, *et al.*,
Plaintiffs-Appellants,

—v.—

ARNOLD ORDMAN, *et al.*,
Defendants-Respondents.

—o—

Before: WATERMAN, MOORE and ANDERSON,
Circuit Judges.

—o—

Appeal from order and judgment, United States District Court for the Southern District of New York, Cannella, *J.*, dismissing plaintiffs-appellants' complaint. Affirmed.

—o—

LEON BRICKMAN, Brooklyn, N. Y.; N. George Turchin, New York City; Spector & Meissner, Brooklyn, N. Y., for Plaintiffs-Appellants.

ARNOLD ORDMAN, General Counsel; Dominick L. Manoli, Associate General Counsel; Marcel Mallet-Prevost, Asst. General Counsel; Solomon I. Hirsh, Lawrence M. Joseph, Attorneys, National Labor Relations Board, for Defendants-Respondents.

—o—

PER CURIAM:

Appellants filed unfair labor practice charges with the National Labor Relations Board. The General Counsel of the Board declined to issue complaints upon the charges. Plaintiffs instituted an action in the United States District Court for the Southern District of New York against the General Counsel and the members of the Board seeking there a declaratory judgment setting forth plaintiffs' rights under the Labor Management Relations Act as charging parties whose charges did not result in the filing of NLRB complaints, and further seeking a mandatory injunction to compel the General Counsel to issue unfair labor practice complaints on their charges.

The defendants-appellees moved to dismiss the complaint on the ground that the court was without jurisdiction over the subject matter. The court below granted the motion and this appeal followed.

We agree with the court below that upon petitions for a declaration of rights by disappointed charging parties the district courts may not review the day-to-day exercise of the discretion given to the General Counsel in the issuance of Board unfair labor practice complaints, and we affirm the result reached below. The opinion of the district court is reported at 51 CCH Lab. Cas. ¶ 19,761 (p. 33,949 (1965).

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 821

UNITED ELECTRICAL CONTRACTORS ASSOCIATION, ET AL., PETITIONERS

v.

ARNOLD ORDMAN, ET AL.[1]

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion and judgment of the district court dismissing the complaint (App. A., *infra*, pp. 9–19) is not officially reported. The opinion of the court of appeals (Pet. A1–A2), affirming the district court's decision, is reported at 366 F. 2d 776.

JURISDICTION

The judgment of the court of appeals was entered on September 23, 1966 (Pet. A1). The petition for a

[1] Respondents are the General Counsel and the members of the National Labor Relations Board.

242-810—66——1

writ of certiorari was filed on December 2, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the action of the General Counsel of the National Labor Relations Board in declining to issue an unfair labor practice complaint is judicially reviewable.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in App. B, *infra*, pp. 20–22.

STATEMENT

At various times between March 28, 1963, and June 19, 1964, petitioners, electrical contractors in New York City, filed unfair labor practice charges with the Regional Office of the National Labor Relations Board alleging that certain unions[2] had violated Sections 8(b)(4)(B) and 8(b)(7)(A) and (C) of the National Labor Relations Act by picketing and other conduct at construction sites where petitioners were working. After investigating each charge in accordance with the Board's Rules and Regulations and Statements of Procedure,[3] the Regional Director—save in one case—

[2] Locals 3, and 25, International Brotherhood of Electrical Workers, and Local 28, Sheet Metal Workers Union, AFL-CIO.

[3] Section 101.4 of the Board's Statements of Procedure (29 C.F.R. § 101.4) states that the Regional Director "requests the person filing the charge to submit promptly evidence in its support"; the person against whom the charge is filed "is asked

declined to issue a complaint. On some charges, he declined to proceed on the ground that the picketing was lawful or the evidence insufficient to establish a violation, and on others, because the duration and effect of the picketing were so slight in his judgment that prosecution would not effectuate the policies of the Act. In the case where he issued a complaint he withdrew it prior to the hearing date when the principal witness recanted the oral statement he had given during the investigation (App. A, *infra*, p. 10).[4] Petitioners appealed the Regional Director's refusals to proceed to the General Counsel of the Board, and after a *de novo* review of each case, the General Counsel sustained the Regional Director (App. A, *infra*, p. 10).[5]

Petitioners then brought suit in the United States District Court for the Southern District of New York

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to submit a statement of his position in respect to the allegation"; and the case "is assigned to a member of the field staff for investigation, who interviews representatives of the parties and other persons who have knowledge as to the charges." The district court found (App. A, *infra*, p. 10) that the Regional Director had complied with this procedure here.

[4] The exhibits attached to the complaints in the district court show that, in each instance, the Regional Director gave petitioners a written statement of his reasons for declining to proceed with the charges and advised them of their right to appeal the matter to the General Counsel of the Board, pursuant to Section 102.19 (29 C.F.R. § 102.19) of the Board's rules (see *e.g.*, Exhibits 1Q, 2E, 3C, 4C).

[5] In each case, the General Counsel gave petitioners a written statement of his reasons for sustaining the Regional Director (*e.g.*, Exhibits 1V, 2[illegible]).

28

against the General Counsel and the Board seeking a declaratory judgment setting forth their rights under the Act and a mandatory injunction compelling the issuance of unfair labor practice complaints on their charges (App. A, *infra*, pp. 10–11). The district court dismissed the complaint on the grounds that it lacked jurisdiction over the subject matter and that the complaint failed to state a claim upon which relief could be granted (App. A, *infra*, pp. 12–13, 18–19). The court of appeals affirmed the district court's action, holding that "the district courts may not review the day-to-day exercise of the discretion given to the General Counsel in the issuance of Board unfair labor practice complaints * * *." (Pet. A-2.)

ARGUMENT

Section 10(b) of the Act vests the Board with wide discretion in the issuance of unfair labor practice complaints,[6] and Section 3(d) channels this discretionary power to the General Counsel of the Board.[7] In view of the discretionary nature of the complaint function, and the fact that the Act makes no provision for judicial review of the General Counsel's refusal to issue a complaint (and indeed specifically precludes review by the Board itself), it has con-

[6] *National Labor Relations Board* v. *Indiana & Michigan Electric Co.*, 318 U.S. 9, 18.

[7] Section 3(d) provides that the General Counsel shall have "final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under Section 10, and in respect of the prosecution of such complaints before the Board."

sistently been held that Congress intended to foreclose district court suits to review the General Counsel's action in declining to proceed on an unfair labor practice charge. *Hourihan* v. *National Labor Relations Board,* 201 F. 2d 187 (C.A.D.C.), certiorari denied, 345 U.S. 930; *Bandlow* v. *Rothman,* 278 F. 2d 866 (C.A.D.C.), certiorari denied, 364 U.S. 909; *Retail Store Employees Union Local 954* v. *Rothman,* 298 F. 2d 330 (C.A.D.C.); *Dunn* v. *Retail Clerks International Ass'n, AFL–CIO, Local 1529,* 307 F. 2d 285 (C.A. 6); see *Lincourt* v. *National Labor Relations Board,* 170 F. 2d 306 (C.A. 1). The holding of the court below, sustaining the district court's dismissal of the complaint, is in accord with this settled authority, and further review is unwarranted.

Petitioners' arguments are in any event without merit. The remarks of Senator Taft relied upon by petitioners (Pet. 4) cannot be read to mean that the General Counsel's *refusal* to issue a complaint is subject to Board and then court review, in light of Section 3(d), which separates the prosecutory and judicial functions of the Board, and gives the General Counsel "final authority" over the former (n. 7, *supra*). Senator Taft was merely pointing out that, where the General Counsel decides to *issue and prosecute* a complaint, his action is "subject to the judicial decision of the Board and, above the Board, the courts" (93 Cong. Rec. 7538), which can dismiss the complaint. The Third Circuit cases cited by petitioners (Pet. 5) hold merely that, in the circum-

stances there presented, the General Counsel, having issued a complaint, could not then accept a settlement over the objection of the charging party without affording him a hearing on his objections. Here the General Counsel did not accept a settlement; he merely withdrew a complaint as without merit when the evidence supporting its issuance was recanted. Furthermore, before doing so he fully advised petitioners of the basis of his action. Nor is there any basis for the implication (Pet. 5) that the General Counsel acted in an arbitrary and impermissible manner. On the contrary, as the district court found, the charges were investigated in accordance with customary procedures, and the reasons given for the refusal to proceed were clearly within the bounds of the General Counsel's discretion under the Act (*supra,* pp. 2–3).[8]

[8] In the argument before the court of appeals, counsel for the General Counsel, far from asserting that the General Counsel could refuse to issue a complaint merely because the charging party was his brother-in-law, as petitioner states (Pet. 5), stated the precise opposite.

In light of the conclusions reached by the Regional Director, sustained on review by the General Counsel (see *infra*, p. 10), petitioners' assertion that, in each of the cases, "a *prima facie* showing of a violation of the Act was made by the charging party" (Pet. 3) represents, at most, only their own differing appraisal of the evidence or of the necessity for a Board remedy. Nor is there any basis for petitioners' further assertion (Pet. 3) that the Regional Director and the General Counsel refused to give plaintiffs an opportunity to present their evidence and to refute contrary evidence. See n. 3, *supra.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
MALCOLM D. SCHULTZ,
Attorney,
National Labor Relations Board.

JANUARY 1967.

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APPENDIX A

United States District Court, Southern District of New York

64 Civ. 3565

UNITED ELECTRICAL CONTRACTORS ASSOCIATION, ET AL., PLAINTIFFS,

against

ARNOLD ORDMAN, ET AL., DEFENDANTS.

CANNELLA, J.: Motion by the defendants, pursuant to Rule 12 of the Federal Rules of Civil Procedure, for an order dismissing the complaint on the grounds that this court lacks jurisdiction over the subject matter of the action and that the complaint fails to state a claim upon which relief can be granted, is granted. In view of the court's determination, the defendant's motion in the alternative for summary judgment pursuant to Rules 12 and 56 of the Federal Rules of Civil Procedure and the plaintiffs' cross-motion for summary judgment are not discussed.

At various times between March 28, 1963 and June 19, 1964, the plaintiffs filed unfair labor practice charges with the Regional Office for the Second Region of the National Labor Relations Board in New York. The charges asserted that Local 3 and Local 25 of the International Brotherhood of Electrical Workers, and Local 28, Sheet Metal Workers Union, AFL–CIO, had violated Section 8(b)(4)(i)(ii)

242-310—66——2

(B) and Section 8(b)(7) (A) and (C) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 541, 29 U.S.C.A. § 151 et seq.) by picketing and other conduct engaged in at certain construction sites at which the various plaintiffs were engaged as electrical contractors. In each instance, the charge was investigated in accordance with the procedural rules and regulations of the Board to determine whether violations of the N.L.R.A. had been committed.

The investigations disclosed that in certain instances the picketing was conducted in accordance with principles of applicable law and that in certain others the effect of the picketing was minimal. On the latter charges, it was determined that it would not effectuate the policies of the Act to issue a complaint. In investigating other charges, insufficient probative evidence was adduced to sustain a finding of a violation. In accordance with these findings, the Regional Director refused to issue complaints on these charges. The plaintiffs were notified of this action. It should be noted that in one case a complaint was issued but was subsequently withdrawn when the principal witness recanted testimony given during the initial investigation and other evidence adduced was found to be erroneous.

In each case, the charging party, plaintiffs here, requested review by the General Counsel. Following a review *de novo*, the General Counsel sustained the Regional Director's rulings. Thus, no complaints were issued.

The plaintiffs instituted action in the Southern District seeking a declaratory judgment setting forth their rights under the N.L.R.A. and a mandatory injunction to compel the General Counsel to issue unfair labor practice complaints on the charges filed

by the plaintiffs before the Regional Office. In substance, the plaintiffs seek a review of the actions of both the Board and the General Counsel in their refusal to issue complaints. In light of the procedure outlined in the Act, the court will treat the suit as brought against the General Counsel only since he has final authority on behalf of the Board in the issuance of complaints in unfair labor practice cases. See Section 3(d) of the Act, 29 U.S.C.A. § 153(d).

The parties have presented to the court, in affidavit form, detailed information concerning each charge submitted to the Board. Due to the court's ruling noted above, discussed *infra*, no mention need be made of the substantive nature of the conduct of the charged parties and the determination made by the Regional Director and the General Counsel.

The National Labor Relations Act provides that the General Counsel shall exercise general supervision over the officers and employees in the regional offices. 29 U.S.C.A. § 153(d). In addition, the General Counsel "* * * shall have final authority, on behalf of the Board, in respect of the investigations of charges and issuance of complaints under section 10 [unfair labor practices] and in respect of the prosecution of such complaints before the Board * * *" 61 Stat. 139, 29 U.S.C.A. § 153(d). The General Counsel has delegated authority to the Regional Directors to issue such complaints. 29 C.F.R. Section 102.15. Any refusal of a Regional Director to issue a complaint may be appealed to the General Counsel. 29 C.F.R. Section 102.19. The plaintiffs duly appealed the Regional Director's refusal to issue complaints to the General Counsel. Since the N.L.R.A., on its face, does not provide for an appeal of the General Counsel's determination, the question is whether another provision of the Act

or some other authority exists for judicial review of the General Counsel's actions.

Section 10(f) of the Act (29 U.S.C.A. § 160(f)) provides that an aggrieved party may obtain review of final orders of the Board in the appropriate circuit court of appeals or in the court of appeals for the District of Columbia. It is clear, however, that the plaintiffs would be unable to petition the circuit court for review of the General Counsel's refusal, for the said refusal is not a final order within the meaning of the Act. Lincourt v. N.L.R.B., 170 F. 2d 306 (1st Cir. 1948). See Wellington Mill Division, West Point Mfg. Co. v. N.L.R.B., 330 F. 2d 579 (4th Cir.), cert. denied, 379 U.S. 882 (1964); General Drivers v. N.L.R.B., 179 F. 2d 492 (10th Cir. 1950). As the First Circuit stated in Lincourt, "[W]e agree with the Board that the phrase 'a final order of the Board' as used in this subsection 'refers solely to an order of the Board either dismissing a complaint in whole or in part or directing a remedy for the unfair labor practices found, that is to an order entered as the culmination of the procedure described in Section 10 (b) and (c) of the Act, as amended'." 170 F. 2d at 307. It is therefore clear that were the relief requested here sought in the circuit court, the plaintiffs' petition would be dismissed. See Anthony v. N.L.R.B., 204 F. 2d 832 (6th Cir. 1953); Lincourt v. N.L.R.B., supra.

The crucial problem thus reached is whether a district court may entertain a suit the consequence of which is a review of the discretionary power given to the General Counsel in the issuance of complaints relating to unfair labor practices. It is clear to the court that no such suit may be maintained and that the refusal of the General Counsel to issue a complaint may not be reviewed by this court. This court

lacks jurisdiction over the subject matter of the action and the plaintiffs' complaint fails to state a claim upon which relief may be granted. In Hourihan v. N.L.R.B., 201 F. 2d 187 (D.C. Cir. 1952), cert. denied 345 U.S. 930 (1953), the plaintiff sought a writ of mandamus in the district court to compel the Board to issue a final order with respect to certain charges of unfair labor practices. The district court dismissed the petition on the grounds that the court lacked jurisdiction over the subject matter and that the petition failed to state a claim upon which relief could be granted. The court of appeals affirmed stating at 201 F. 2d 188: "The Board cannot issue an order until the General Counsel issues a complaint. A court has no power to order the General Counsel to issue a complaint (footnote omitted) and no power to require the Board to issue an order in a matter which is not before the Board." While the court stated reservations over the complete immunity of the General Counsel from review (footnote 4 at 188), further decisions of the District of Columbia Circuit as well as other courts of appeals leave little doubt that the General Counsel's refusal cannot be questioned.

Retail Store Employees Union Local 954 v. Rothman, 298 F. 2d 330 (D.C. Cir. 1962) reaffirmed the principles announced in Hourihan. In Retail Store Employees, the plaintiff sought a mandatory injunction to require the General Counsel to issue a complaint. On motions identical to those made in the instant case, the district court dismissed the action. The court of appeals affirmed quoting the Hourihan holding. While the court reasserted the Hourihan reservation (footnote 1 at 332), it was apparently limited in its scope. "The court should not be asked to take over the work of the General Counsel's office,

or to scrutinize his decisions in matters of the present kind, *except perhaps in the most extreme situations.* This is certainly not such a situation and should not have been the subject of litigation in the courts." (Emphasis added) 298 F. 2d at 332.

Mandatory injunctive relief was once again sought in Dunn v. Retail Clerks International Ass'n, AFL-CIO, 307 F. 2d 285 (6th Cir. 1962). The district court held that the complaint failed to state a cause of action and the court of appeals affirmed. After a review of the statutory scheme in the charge of unfair labor practices, the court stated: "The General Counsel has a wide discretion in determining whether a complaint should issue and the Act provides no appeal from his decision." (Citation omitted). 307 F. 2d at 288. It was noted that Section 10(f) of the Act provided for appellate review of final orders but that "[N]o other jurisdiction is granted by the Labor Acts for an employer to petition for relief in the District Courts." Supra at 288.

In Division 1267, Amal. Ass'n of Street, El. Ry. v. Ordman, 320 F. 2d 729 (D.C. Cir. 1963), the General Counsel had found insufficient basis for the issuance of complaints. The charging party brought suit in the district court for a judgment that the charged parties were not exempt from the coverage of the Act. The district court dismissed the complaint on the ground that it lacked jurisdiction over the subject matter of the action. The court of appeals in affirming the district court stated: "The Act gives the General Counsel discretion, independent of the courts, regarding charges of unfair labor practices." 320 F. 2d at 730. While the affirmance was based on the fact that the complaint failed to state a claim upon which relief could be granted, it was clear that the refusal of the General Counsel was immune from review.

Other circuit courts have had an opportunity to comment on this question, most recently the Second Circuit in Local 282, International Bro. of Teamsters v. N.L.R.B., 339 F. 2d 795 (1964).

> The Board, or since 1947 the General Counsel, § 3(d), thus is *dominus litis;* the General Counsel has power to decide whether to issue a complaint, Lincourt v. N.L.R.B., 170 F. 2d 306 (1 Cir. 1948). * * * His statutory authority "in respect of the prosecution of such complaints before the Board" must include the power to determine whether a complaint can be successfully prosecuted and, if he thinks not, to drop it * * * 339 F. 2d at 799.

This court may not entertain the plaintiffs' action for a review of the General Counsel's determination. Division 1267 Amal. Ass'n of Street, El. Ry. v. Ordman, supra; Dunn v. Retail Clerks International Ass'n, AFL-CIO, supra; N.L.R.B. v. Lewis, 310 F. 2d 364 (7th Cir. 1962); Retail Store Employees Union Local 954 v. Rothman, supra; International Union of Electrical, Radio & Machine Workers, AFL-CIO v. N.L.R.B., 289 F. 2d 757 (D.C. Cir. 1960); Bandlow v. Rothman, 278 F. 2d 866 (D.C. Cir. 1960); N.L.R.B. v. Lewis, 249 F. 2d 832 (9th Cir. 1957), aff'd 357 U. S. 10 (1958); Hourihan v. N.L.R.B., supra; Lincourt v. N.L.R.B., supra. See American Metal Products Co. v. Reynolds, 332 F. 2d 434 (6th Cir. 1964); General Drivers v. N.L.R.B., supra. See generally, N.L.R.B. v. Indiana & Michigan Electric Co., 318 U. S. 9 (1943).

Mention should be made of exceptions in an analogous situation. In McLeod v. Local 476, United Brotherhood of Indus. Wkrs., 288 F. 2d 198 (2d Cir. 1961), the court noted that the district court lacked

jurisdiction over the subject matter in an action for a preliminary injunction in a representation proceeding. However, two recognized exceptions were discussed. If a constitutional question is presented (e.g. denial of procedural due process citing Fay v. Douds, 172 F. 2d 720 (2d Cir. 1949)), or the Board acts in direct and conceded violation of the statute, the district court may entertain the suit. Neither exception has yet been pronounced applicable in a requested review of the General Counsel's discretion in issuance of complaints on unfair labor practice charges. Furthermore, the factual situation at bar presents no issue under either exception.

Plaintiffs have asserted that Leedom v. Kyne, 358 U. S. 184 (1958) stands for the principle that a district court has jurisdiction to order the General Counsel to issue a complaint. However, as the court noted in American Metal Products Co. v. Reynolds, supra, Leedom held that a district court has jurisdiction to strike down an order of the Board in excess of its delegated powers and contrary to the specific prohibition of the N.L.R.A. As the court stated, "[I]t is recognized that the ruling in Leedom v. Kyne * * * is an exception to the general rule that the District Court has no jurisdiction to review or enjoin orders or proceedings of the Board," 332 F. 2d at 435. No claim is made here that the Board has contravened its delegated powers or acted contrary to the provisions of the Act.

Plaintiffs initially base their claim of jurisdiction on the general grant conferred by 28 U.S.C.A. § 1337. It is clear that general statutes do not confer jurisdiction where an applicable regulatory statute precludes it. See Schilling v. Rogers, 363 U.S. 666 (1960); Skelly Oil Co. v. Phillips Petroleum Co., 339

U.S. 667 (1950); McCauley v. Waterman S.S. Corp., 327 U.S. 540 (1946). Congress clearly has the power, exercised in the instant situation, to provide the manner in which a remedy may be effectuated. Amalgamated Utility Workers v. Consolidated Edison Co., 309 U.S. 261 (1940). The applicable statute (29 U.S.C.A. § 151 et seq.) forecloses the district court from the inquiry requested here.

The Administrative Procedure Act (5 U.S.C.A. § 1001 et seq.) is asserted as a base of jurisdiction for this action. But the provisions of Section 10 of that Act clearly prevent its use in the case at bar. It provides for judicial review of the determinations of agencies in general "[E]xcept so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion." 5 U.S.C.A. § 1009. Section 3(d) of the N.L.R.A. precludes judicial review of the General Counsel's refusal to issue a complaint, which refusal is within the discretion of the General Counsel.

Plaintiffs also assert that the Federal Declaratory Judgment Act, 28 U.S.C.A. § 2201, confers jurisdiction on this court here. However, this Act does not grant jurisdiction on the district courts, but merely provides an additional remedy in cases where jurisdiction already exists. See Schilling v. Rogers, supra; Skelly Oil Co. v. Phillips Petroleum Co., supra; Lam Tat Sin v. Esperdy, 227 F. Supp. 482, 484 n. 1 (S.D.N.Y.) aff'd 334 F. 2d 999 (2d Cir.), cert. denied 379 U.S. 901 (1964); Kaufman & Ruderman, Inc. v. Cohn & Rosenberger, Inc., 86 F. Supp. 867 (S.D.N.Y.), aff'd 177 F. 2d 849 (2d Cir. 1949). See also, Eastman Kodak Company v. Velveray Corp., 175 F. Supp. 646 (S.D.N.Y. 1959); Moses v. Ammond, 162 F. Supp. 866 (S.D.N.Y. 1958). It is clear to this court that no independent ground exists

for the assertion of jurisdiction here and this Act may not be used for the purpose asserted.

The motion to dismiss is granted.

So ordered.

Dated New York, N.Y., May 28, 1965.

JOHN M. CANNELLA,
U.S.D.J.

JUDGMENT

United States District Court, Southern District of New York

64 Civ. 3565

UNITED ELECTRICAL CONTRACTORS ASSOCIATION, RABCO ELECTRIC CORP., VIKING MARINE ELECTRICAL CORP., SURF HUNTER ELECTRIC CO., INC., AMPERE ELECTRICAL CONTRACTORS, INC., EXCELLO ELECTRICAL CONSTRUCTION AND MAINTENANCE CO., INC., PETER J. LOBELLO, JACK PICOULT, GOTTLIEB CONTRACTING, INC., SAMAL ELECTRIC CO., INC., AND INDUSTRIAL WORKERS OF ALLIED TRADE LOCAL 199, PLAINTIFFS,

vs.

ARNOLD ORDMAN, INDIVIDUALLY AND AS GENERAL COUNSEL, CHAIRMAN AND MEMBERS, RESPECTIVELY OF AND CONSTITUTING THE NATIONAL LABOR RELATIONS BOARD, DEFENDANTS.

The defendants having moved before the Honorable John M. Cannella, United States District Judge, under Rule 12(b) of the Federal Rules of Civil Procedure to dismiss the complaint for lack of jurisdiction over the subject matter and that the complaint fails to state a claim upon which relief can be granted, and the plaintiffs having cross-moved for summary judgment in their favor, and the Court

having rendered its opinion on June 1, 1965, in favor of the defendants, it is

ORDERED, ADJUDGED and DECREED that the defendants have judgment against the plaintiffs dismissing the complaint.

Dated New York, N.Y., June 1, 1965.

JAMES E. VALECHE,
Clerk.

APPENDIX B

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are as follows:

Sec. 3.

* * * * *

(d) There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under Section 10, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law. * * *

* * * * *

Sec. 8(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise, handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry

affecting commerce, where in either case an object thereof is: * * * (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

* * * * *

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees: (A) where the employer has lawfully recognized in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under section 9(c) of this Act, (B) where within the preceding twelve months a valid election under section 9(c) of this Act has been conducted, or (C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided,* That when such a petition has been filed the Board shall forthwith, without regard

to the provisions of section 9(c)(1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further*, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services. Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this section 8(b).

* * * * *

Sec. 10

* * * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: * * *

* * * * *

U.S. GOVERNMENT PRINTING OFFICE: 1965